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PERCY WONG KIET v. PP

HIGH COURT SABAH & SARAWAK, KUCHING
RHODZARIAH BUJANG J
[CRIMINAL REVISION NO: KCH-43-8-10-2015]
6 NOVEMBER 2015

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CRIMINAL PROCEDURE: *Revision – Revision of Magistrate's order – Charge of murder – Penal Code, s. 302 – Magistrate allowed prosecution's requests for further mentions of case pending chemist and medical reports – Applications by accused person for remission of case to High Court rejected by Magistrate – Whether case ready to be transmitted to High Court – Whether consent of Public Prosecutor to transmit case obtained – Whether consent mandatory – Implied consent of Public Prosecutor – Criminal Procedure Code, ss. 117(2)(a), 177A & 377(b)(3)*

C

CRIMINAL PROCEDURE: *Prosecution – Public Prosecutor – Charge of murder – Penal Code, s. 302 – Magistrate allowed prosecution's requests for further mentions of case pending chemist and medical reports – Applications by accused person for remission of case to High Court rejected by Magistrate – Whether consent of Public Prosecutor to transmit case obtained – Whether consent mandatory – Implied consent of Public Prosecutor – Criminal Procedure Code, ss. 117(2)(a), 177A & 377(b)(3)*

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The applicant was charged at the Magistrate's Court for murder, an offence under s. 302 of the Penal Code. He was first brought before the Magistrate on 11 August 2015 where the charge was tendered, read and explained to him and his co-accused, without their pleas being taken. The Deputy Public Prosecutor ('DPP') applied for further mention of the case pending both the chemist and medical reports. The applicant requested, *inter alia*, for the case to be remitted to the High Court as soon as possible. At the next mention of the case, the DPP applied for a further mention but the applicant requested that the case be remitted to the High Court without further delay. In refusing the applicant's request and fixing a further mention date, the Magistrate opined that no consent had been given by the Public Prosecutor ('PP') as the chemist report was not ready and s. 41A of the Dangerous Drugs Act 1952 ('DDA'), Criminal Procedure Code ('CPC') or Penal Code do not provide a special provision relating to transmission of a case to and trial by the High Court. The Magistrate further found that the case was not ready to be transmitted to the High Court as s. 177A of the CPC warrants for consent to be submitted before transmitting the same to the High Court. On the next mention date, the same application was repeated by the DPP and despite strenuous objection by the applicant, the Magistrate acceded to the DPP's application and fixed 6 November 2015 as the next mention date. Hence, the present application for a revision of the Magistrate's order giving 6 November 2015 as the next mention date.

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Held (declining to revise order of Magistrate giving 6 November as next mention date; ordering said date to be final adjournment of case):

(1) Although the Magistrate was absolutely right that consent was a must before the transmission of the case could be ordered, he had fallen into error when he made that decision. The prosecution was already conducted by the DPP and who, according to s. 377(b)(3) of the CPC, exercised all or any of the rights and powers vested in or exercisable by the PP by or under the said Code or any other written law except of course those expressly stated by the law to be exercisable personally by the PP. Thus, when the prosecution is conducted by the DPP, the consent of the PP is to be inferred or implied. (para 5)

(2) In the old days, all prosecutions in the subordinate courts were conducted by a police officer duly authorised to do so by the PP. It is with this practice in mind that the requirement on written consent of the PP, as embedded in the law, should be viewed as an integral part of the filtering process. (para 5)

(3) There is some difference in the wordings of the relevant provisions in the CPC and the DDA but clearly, the intent and purpose of the proceedings before the Magistrate's Court was the same *ie*, to ensure that there is sufficient evidence before the case is tried in the High Court. The Magistrate had no option but to transmit the case to the High Court. However, 'when' he must do it is not immediately upon the charge being tendered because no such word or words to that effect was used in s. 177A of the CPC. (para 9)

(4) The case of *PP v. Marwan Ismail* stipulated that the accused person is to be brought before the High Court as soon as is practicable. It does not say that it must be done right after the charge is tendered before the Magistrate. Considering the legislative purpose of enacting s. 177A of the CPC was to replace that of a preliminary inquiry *ie*, a proceeding to ensure sufficient evidence before the case is tried by the High Court, the prosecution must be given some leeway on time to ensure that it was so under the present s. 177A of the CPC. (para 10)

(5) Under s. 117(2)(a) of the CPC, a Magistrate can only order a maximum of 14 days remand for an offence punishable with death (or 14 years imprisonment). In that short period of 14 days, it would not be reasonable to expect that chemist reports or forensic reports to be ready, especially when the facts are complex and in their absence, the necessary evidence for the trial to commence in the High Court would not be available. The court must therefore balance the need for a speedy trial with the need of the prosecution to ensure that all available evidence is before the court to proceed with the trial in the High Court. (para 10)

(6) The applicant and his co-accused have been remanded since 11 August 2015 and by the next mention date fixed by the Magistrate, *ie*, 6 November 2015, they would be in remand for three months. That was a reasonable period to ensure that all evidence such as the necessary chemist report was available before the trial was fixed in the High Court. (para 11)

Case(s) referred to:
Perumal v. PP [1970] 1 LNS 101 FC ***(refd)***
PP v. An Kee Cheng & Another Case [2006] 5 CLJ 427 HC ***(refd)***
PP v. Marwan Ismail [2008] 3 CLJ 164 CA ***(refd)***
PP v. Thayalan Maniam [2007] 2 CLJ 185 HC ***(refd)***
PP v. Tiong King Guan & Anor [2015] 3 CLJ 48 CA ***(dist)***
PP v. Toha M Yusuf & Ors [2006] 2 CLJ 800 HC ***(refd)***
Sri Bangunan Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor [2007] 5 CLJ 673 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 117(2)(a), 177A, 377(b)(3)
Dangerous Drugs Act 1952, ss. 39B(1)(a), (3), (4), 41A
Penal Code, s. 302

For the applicant - Shankar Ram Pohumall; M/s Thomas, Shankar Ram & Co
For the respondent - Mirza Mohamad; DPP

Reported by Najib Tamby

JUDGMENT

Rhodzariah Bujang J:

[1] The applicant has applied for a revision of the order of the learned Magistrate who has agreed to the prosecution's application to further mention the case against him. The charge tendered against him and two others in the Magistrate Court is that under s. 302 of the Penal Code, ie, for murder. He was first brought before the learned Magistrate on 11 August 2015 where the charge was tendered, read and explained to him and his co-accused persons without their pleas being taken. The prosecution was then conducted by Deputy Public Prosecutor Khairul Nazmi who applied for further mention of the case pending both the chemist and medical reports. The applicant's counsel, Mr Shankar Ram had requested, amongst others, for the case to be remitted to the High Court as soon as possible. At the next mention of the case on 10 September 2015, again the prosecution but this time represented by DPP Tajul Ariffin, applied for further mention on the same ground that the chemist report was not ready. Again Mr Shankar Ram requested that the case be remitted to the High Court without further delay but which the learned Magistrate refused and where upon he fixed a further mention on 8 October 2015. On the said date, the same application was

repeated by DPP Tajul Ariffin based on the same ground and which of course met with the same strenuous objection by Mr Shankar Ram. He was also overruled by the learned Magistrate who fixed 6 November 2015 as the next mention date for the case. Hence, this application now by the applicant before me to revise the said order.

Section 177A

[2] The proceedings before the learned Magistrate is of course held under s. 177A of the Criminal Procedure Code which provides as follows:

> 177A. Transmission of case to, and trial by, the High Court.
>
> (1) A prosecution in respect of an offence which is to be tried by the High Court in accordance with Chapter XX, shall not be instituted except by or with the consent of the Public Prosecutor:
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> Provided that a person may be arrested, or a warrant for his arrest may be issued and executed, and any such person may be remanded in custody notwithstanding that the consent of the Public Prosecutor to the institution of a prosecution for the offence has not been obtained, but the case shall not be further prosecuted until the consent has been obtained.
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> (2) In any prosecution pursuant to subsection (1), the accused shall be produced before the Magistrate's Court which shall, after the charge has been explained to him, transmit the case to the High Court and cause the accused to appear or be brought before the Court as soon as may be practicable:
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> Provided that when the accused is brought before the Magistrate's Court before the Public Prosecutor has consented to the prosecution, the charge shall be explained to him but he shall not be called upon to plead thereto.
>
> (3) When the accused appears or is brought before the High Court in accordance with subsection (2), the High Court shall fix a date for his trial which shall be held in accordance with the procedure under Chapter XX.

[3] The precursor to this section is Chapter XVII of the Criminal Procedure Code which required all capital punishment cases before the High Court to be preliminarily tried by the Magistrate before its transmission to the High Court for trial. As Zaharah Ibrahim JC (as Her Ladyship then was) explained *PP v. An Kee Cheng & Another Case* [2006] 5 CLJ 427:

> (2) The consent of the Public Prosecutor was *in lieu* of the committal order which previously could only be made by a Magistrate at the end of a preliminary inquiry, after evidence by deposition had been taken by the Magistrate and he was satisfied that there was sufficient evidence for the case to be tried in the High Court. This filtering process through preliminary inquiries has been replaced with the process of filtering through the mechanism of the Public Prosecutor's consent. Such filtering

process was not capable of being performed by a Magistrate after the abolition of preliminary inquiries. At the stage of the case before the Magistrate as in the two said cases herein, only the Public Prosecutor has the capacity, with all the information available to him or which he was capable of obtaining from the police or other enforcement agencies, to determine whether there was sufficient evidence for the case to be tried by the High Court in accordance with Chapter XX of the CPC.

(3) Under cl.(3) of art. 145 of the Federal Constitution, the Attorney General has the discretionary power to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court martial.

[4] The issue of consent of the Public Prosecutor is very much relevant in this case before me because that is the very reason for the adjournment given by the learned Magistrate in his ruling of the 8 October 2015. In his own words, this was what he said:

There were no consent yet given by the PP as the chemist report are not ready and no special provision as per section 41A DDA in the CPC or Penal Code providing a Special Provision relating to transmission of a case to and trial by, the High Court.

We are not deciding on technical issue or dealing anything with the charge as stated in the case submitted by the Defence Counsel. The case of *PP v. Tiong King Guan & Anor* simply not applicable in our case.

It is just that the case are not ready to be transmitted to the high court yet at this juncture. It is clear that the section 177A CPC warrant for a consent to be ready before transmitting the same to the High Court.

[5] With respect, the learned Magistrate has fallen into error when he made that decision although he is absolutely right that a consent is a must before the transmission of the case is to be ordered. The mistake here is because the prosecution was already conducted by Deputy Public Prosecutor and who, according to s. 377(b)(3) of the Criminal Procedure Code, exercises all or any of the rights and powers vested in or exercisable by the Public Prosecutor by or under the said Code or any other written law except of course those expressly stated by the law to be exercisable personally by the Public Prosecutor. Thus, when the prosecution is conducted by a Deputy Public Prosecutor, the consent of the Public Prosecutor is to be inferred or implied as decided by the Federal Court in *Perumal v. PP* [1970] 1 LNS 101; [1970] 2 MLJ 265. Further on this issue it is also worth mentioning that generally and especially in the old days, all prosecutions in the subordinate courts were conducted by a police officer duly authorised to do so by the Public Prosecutor. It is with this practice in mind that the requirement on written consent of the Public Prosecutor as embedded in the law should be viewed as an integral part of the filtering process alluded to in *An Kee Cheng*'s case (*supra*).

[6] Mr Shankar Ram has also cited to me the Court of Appeal case of *PP v. Marwan Ismail* [2008] 3 CLJ 164 which outlines the steps that a Magistrate must take before transmitting a case to the High Court but that is in relation to the offence of drug trafficking under s. 39B(1) of the Dangerous Drugs Act 1952. The Dangerous Drugs Act 1952 I noted has a similar provision to s. 177A although not in one section but spread into two sections. The first on consent of the Public Prosecutor is ss. 39B(3) and (4) which reads as follow:

> (3) A prosecution under this section shall not be instituted except by or with the consent of the Public Prosecutor;
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> Provided that a person may be arrested, or a warrant for his arrest may be issued and executed, and any such person may be remanded in custody notwithstanding that the consent of the Public Prosecutor to the institution of a prosecution for the offence has not been obtained, **but the case shall not be further prosecuted until the consent has been obtained.**
>
> (4) When a person is brought before a Court under this section before the Public Prosecutor has consented to the prosecution the charge shall be explained to him but he shall not be called upon to plead, and the provision of the law for the time being in force relating to criminal procedure shall be modified accordingly.
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> (emphasis added).

[7] The other, on transmission of the case is in s. 41A and it reads as follows:

> 41A. Special Provision relating to transmission of a case to and trial by, the High Court.
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> (1) Where any case in respect of an offence under this Act is triable exclusively by the High Court or is required by the Public Prosecutor to be tried by the High Court, the accused person shall be produced before the appropriate subordinate court which shall, after the charge has been explained to him, transmit the case of the High Court without holding a preliminary inquiry under Chapter XVII of the Criminal Procedure Code, and cause the person to appear or brought before such Court as soon as practicable.
>
> (2) When the accused person appears or brought the High Court in accordance with subsection (1), the High Court shall fix a date for his trial which shall be held in accordance with the procedure under Chapter XX of the Criminal Procedure Code.
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> (3) The trial of a case transmitted to the High Court under subsection (1) shall be by a Judge of the High Court sitting alone, and the provisions of Chapters XXI and XXII of the Criminal Procedure Code shall not apply to such trial.

[8] After considering these relevant provisions, the Court of Appeal then enumerated the following guidelines to the Magistrate:

(i) have the charge read to him;

(ii) explain to him the charge;

(iii) not to record any plea by the accused, even if he chose to make one;

(iv) transmit the case to the High Court; and

(v) cause the accused person to be brought before the High Court as soon as is practicable.

[9] Although as can be seen from my reproduction of the relevant provisions in the Criminal Procedure Code and Dangerous Drugs Act 1952 above that there is some difference in the wordings of the said provisions but clearly the intent and purpose of the proceedings before the Magistrate Court is the same - ie, to ensure that there is sufficient evidence before the case is tried in High Court. That being the case, as decided in *Marwan*'s case (*supra*) as well as the other two cases cited by Mr Shankar Ram ie, *PP v. Toha M Yusuf & Ors* [2006] 2 CLJ 800; [2006] 4 MLJ 63, *PP v. Thayalan Maniam* [2007] 2 CLJ 185; [2007] 4 MLJ 239 and *An Kee Cheng*'s case (*supra*) which I mentioned earlier, the Magistrate has no option but to transmit the case to the High Court. I also noted that in all these cited cases, the delay in transmission such as the chemist report not being ready was not tolerated by these courts. I must mention however that the Court of Appeal's case of *PP v. Tiong King Guan & Anor* [2015] 3 CLJ 48 cited by Mr Shankar Ram although also on s. 177A of the Criminal Procedure Code is distinguishable on the facts in that the learned Sessions Court Judge instead of transferring the case to the High Court when the charge of culpable homicide against the two accused persons were amended to that abetment of murder, quashed the said amended charge. The Court of Appeal held that a Magistrate or Sessions Court Judge has no such power to question and decide on the technicalities of the charge and must transmit the case to the High Court pursuant to s. 177A of the Criminal Procedure Code.

[10] The crucial issue now is whether the transmission must be immediate or forthwith after the charge is tendered before the Magistrate. It is a canon of statutory interpretation that the court must not read words into a statute unless clear reason for it is to be found in the statute itself (see the Federal Court case of *Sri Bangunan Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor* [2007] 5 CLJ 673; [2007] 2 MLRA 187). Thus, although the Magistrate have no choice but to order the transmission of the case to the High Court, when he must do it is not immediately upon the charge being tendered because no such word or words to that effect is used in s. 177A. In this regard I refer again to the last guideline in *Marwan*'s case (*supra*) which says that the accused person is to be brought before the High Court "as soon as is

practicable". It does not say that it must be done right after the charge is tendered before the Magistrate. Further, considering that the legislative purpose of enacting s. 177A is to replace that of a preliminary inquiry ie, a proceeding to ensure sufficient evidence before the case is tried by the High Court, the prosecution must be given some leeway on time to ensure that it is so under the present s. 177A. This is because s. 117(2) of the Criminal Procedure Code on the remand of a suspect after his arrest has been amended by Act A1274 which took effect on 6 March 2006, and with that amendment a Magistrate can only order, under the new s. 117(2)(a) a maximum of 14 days remand for an offence punishable with death (or 14 years imprisonment). In that short period of 14 days it would not be reasonable to expect that chemist reports or forensic reports be ready especially when the facts are complex and in their absence, the necessary evidence for the trial to commence in the High Court would not be available. The court must therefore balance the need for a speedy trial with the need of the prosecution to ensure that all available evidence is before the court to proceed with the trial in the High Court.

[11] Saying all these does not mean that the court should condone a prolonged pre-trial detention of an accused charged with capital punishment or an unreasonable delay in the trial. For example, *Toha*'s case (*supra*) was exceptionally delayed for the accused person there was first charged in the Magistrate Court under s. 39B(1)(a) of Dangerous Drugs Act 1952 on 7 May 2004 and the case was only transmitted to the High Court on 16 December 2005 ie, a delay of 20 months. Coming back to the facts of this case, the applicant and his co-accused have been remanded since 11 August 2015 and by the next mention date fixed by the learned Magistrate, ie, 6 November 2015, they would be in remand for three months. That is in my view, a reasonable period to ensure that all evidence such as the necessary chemist report is available before the trial is fixed in the High Court. I would therefore decline to revise the order of Magistrate giving 6 November 2015 as the next mention date but in fairness would order that the said date be the final adjournment of the case.